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IN THE

Supreme Court of the United States

October Term, 1973

No. 1225

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
Intervenors.

BRIEF FOR INTERVENORS SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT AND SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA IN OPPOSITION

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit dated October 10, 1973, is reported at 486 F.2d 907, and is printed in the Appendix hereto

(3a). The Decision and Order of the National Labor Relations Board, including the opinion of Trial Examiner Thomas A. Ricci, dated May 16, 1972 is reported at 196 NLRB No. 166, and is printed in the Appendix hereto (16a). Orders of the National Labor Relations Board dated May 22, 1972 and August 31, 1972, correcting the Order of May 16, 1972 are printed in the Appendix hereto (46a, 48a). Prior related proceedings are reported as follows: Opinion of the United States Court of Appeals for the Second Circuit, reported at 457 F.2d 1127; reversing Opinion of the United States District Court for the Southern District of New York reported at 329 F.Supp. 151 (S.D. N.Y. 1971).

Jurisdiction

The alleged jurisdictional requisites are set forth in the petition at page 2. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Question Presented

Whether a labor organization representing employees in the maritime industry violated Section 8(e) of the National Labor Relations Act, 73 Stat. 744, 29 U.S.C. §158(e) by enforcing a provision in its collective bargaining agreement with an employer so as to prevent the employer from selling one of its vessels to another employer unless the latter agreed to assume the collective bargaining agreement and hire its new employees through the labor organization's hiring hall.

Statutes Involved

The relevant statutory provision is the National Labor Relations Act, §8(e), 73 Stat. 544, 29 U.S.C. §158(e). The text of this provision is set forth in the petition at pages 3-4.

Statement of the Case

In 1969 Commerce Tankers Corporation ("Commerce") was engaged in the business of owning and operating two American flag oceangoing or deep-sea tankers, the *S.S. Thalia* and the *S.S. Barbara*. At that time it entered into a 3-year collective bargaining agreement with the National Maritime Union ("NMU"). Although Commerce was not a member of any multi-employer association for bargaining purposes, the contract which it signed was the same as contracts independently entered into by some 48 tanker companies belonging to the Tanker Service Committee, whose representative conducted pattern-setting negotiations with the NMU.

The NMU contract provided, among other things, that if Commerce sold its ships to any American flag shipper (but not a foreign flag shipper) which was not already a signatory to the contract, the ship would be sold with a crew provided by the Union, and further required that Commerce obtain from the purchaser an undertaking that it would abide by all the terms and conditions of the NMU contract.[1]

1. In relevant part, the contract clause at issue is as follows:
Article I, Section 2. Sale and Transfer of Vessels.
(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement,

Pursuant to its contract with the NMU, Commerce obtained the unlicensed seamen needed to man its ships through NMU hiring halls located in various ports. Under the hiring hall system seamen seeking work register with the hall for the jobs for which they are qualified, and the time of their registration is recorded. When employers call in job vacancies, these jobs are posted and then bid upon by the registrants. Seamen using the NMU hiring hall are divided into three different groups on the basis of their training and years of service on NMU contracted vessels, no matter who their employers may have been and no matter how many collective bargaining units they were members of. Group I seamen, those with the most experience in any maritime job, are entitled to priority in being dispatched for available jobs. If no Group I seamen bid on a particular job, Group II and then Group III seamen

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that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as herein-above provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

have an opportunity to bid. Within any particular group, the job goes to the seaman longest out of work who is qualified and bids on the job.

In December 1970, Commerce sold one of its two vessels, the *S.S. Thalia*, to a tanker company which, like Commerce, was signatory to the standard NMU tanker contract. The *S.S. Thalia* was then preparing to sail to India and its crew of permanent employees and temporary replacements was already signed on. At the time of the transfer of ownership, NMU ordered the Commerce employees off the ship and posted 29 permanent jobs for bidding in the hiring hall. Commerce's 29 employees thus lost their rights to their jobs and were required to compete for new assignments with the seamen registered in the NMU hiring hall.

As is illustrated by the above-described events following the sale of the *S.S. Thalia*, the fact that a vessel is sold to an employer who is signatory to an NMU contract in no way assures that the jobs of the employees assigned to the ship are preserved, and on the contrary, in practice the seller's employees lose their existing job rights. The NMU conceded before the Board (and does not contest before this Court) that Article I, Section 2 of its collective bargaining agreement, the contract clause at issue herein, does not preserve the jobs of the particular individuals employed on the vessel being transferred.

On December 23, 1970, shortly after the sale of the *S.S. Thalia*, Commerce agreed to sell its last remaining vessel, the *S.S. Barbara*, to Vantage Steamship Corporation ("Vantage"), a New York corporation which operates six American flag vessels known as "the Vantage group" in

world-wide trade. Vantage and its subsidiary corporations were members of the American Martime Association, a multi-employer association whose employees were represented by the Seafarers International Union (herein "the SIU"), and all the vessels in the Vantage fleet were covered by contracts with the SIU. Over the years the Vantage group would buy and sell vessels and with each vessel purchased, the vessel and the unlicensed crew to man the same would be covered by the SIU contract as part of the Vantage fleet as an accretion under the observed Board rule of fleetwide units, hereinafter discussed.

And so, when Vantage contracted to purchase the *S.S. Barbara* from Commerce, Vantage as purchaser did not assume or undertake, as a condition of such purchase, any obligation to honor or abide by any collective bargaining agreement for unlicensed seamen employees which may have been in effect between the seller Commerce and the NMU representing the unlicensed seamen employees. Indeed, on February 5, 1971, when Commerce and NMU representatives met concerning NMU's insistence that Vantage undertake to assume and honor the NMU collective bargaining agreement for the *S.S. Barbara*, Commerce advised NMU that Vantage informed them that they could not give any such undertaking, as their "fleet" was bound to the SIU contract, and that was how ships sales and purchases operated in the maritime industry, which Commerce further explained to NMU representatives, was its then understanding. NMU did not dispute such understanding, but instead suggested to Commerce that Vantage use a subterfuge; form a separate subsidiary to purchase the *S.S. Barbara* and then give an undertaking, further explaining that there were other companies in the maritime industry that had done this.

In late March 1971, Commerce and NMU representatives met again in an endeavor to resolve the aforesaid issue, so as to permit the *S.S. Barbara* sale and transfer of title to Vantage. Commerce representatives advised the NMU that the possibility of a domestic sale of the *S.S. Barbara* was "virtually impossible" because of deteriorating conditions and that only one or two purchasers were interested, both foreign flag operators: as such, Commerce insisted that NMU had no reason to stop the sale to Vantage, "*because in either event, whether we sold to Vantage, or whether we sold to foreign flags, they [NMU] would lose the jobs.*" It is to be noted that the NMU's aforesaid collective bargaining provision under attack herein is *not* applicable to sales of NMU contracted vessels to foreign flag operators, being limited solely to sales to American flag vessel operators.

In reply to the statement of Commerce's representative (its counsel, Mr. Cohen) Mr. Shannon Wall, NMU's Secretary-Treasurer, stated:

> "* * * he would rather they be lost foreign than be lost to the rival union SIU. He [Wall] was talking in the context of this being a principal [sic], an important principal [sic] to the NMU which they were seeking to uphold.
>
> "Mr. Sovel [NMU's attorney] made the comment that the granting of this dispensation [the aforesaid Commerce request] wouldn't look very good in the proceedings that were then pending."

In concluding his direct testimony as to this March meeting with the NMU representatives, counsel Cohen was asked the following question by the Board's Counsel and gave the answer as follows:

"Q. There is no doubt in your mind, sir, that Mr. Wall made the statement, in words or in substance, that you have just attributed to him, that he would sooner the sale went foreign than see it go to a rival union.

"A. Yes, he said Mr. Nathanson [another Commerce official] and I didn't understand the intense rivalry between the SIU and NMU."

In the meantime, on February 8, the NMU secured an arbitration award restraining Commerce from delivering the *S.S. Barbara* to Vantage or any other purchaser without complying with the ship transfer provisions of the NMU contract, and on March 2, 1971, Judge Frankel of the United States District Court for the Southern District of New York confirmed this award and issued a preliminary injunction.

In the interim, on February 16, Vantage filed a charge with the Board alleging that both the NMU and Commerce were violating Section 8(e) of the Act.

Subsequently the Regional Director of the Board's Second Region sought a Section 10(l) injunction against the NMU and Commerce on the ground that he had reasonable cause to believe that they were violating Section 8(e) of the Act, and on July 15, 1971, Judge Croake of the United States District Court for the Southern District of New York refused to issue such an injunction. *McLeod* v. *National Maritime Union*, 329 F.Supp. 151. In a consolidated appeal, the United States Court of Appeals vacated the injunction issued by Judge Frankel in favor of the NMU and, finding that the Regional Director had reasonable cause to believe that the NMU and Commerce had violated Section

8(e) of the Act, remanded to Judge Croake with instructions that he issue the requested Section 10(l) injunction. *National Maritime Union* v. *Commerce Tankers Corp.*, 457 F.2d 1127 (2nd Cir. 1972).

In the unfair labor practice proceeding, the National Labor Relations Board held that the ship transfer provision of the NMU contract violated Section 8(e) of the Act, *National Maritime Union* (*Commerce Tankers*), 196 NLRB No. 166, rejecting the NMU's defense that the NMU provision had a primary work preservation object. Rather, the Board found that since the clause imposed restrictions on sales which were of no benefit to the Commerce employees, who on sale would be removed from the vessel, similar to the employees on the *Thalia*, the clause was not strictly germane to the economic integrity of the Commerce work unit and was therefore secondary.

On petition for enforcement, the United States Court of Appeals for the Second Circuit, *N.L.R.B.* v. *National Maritime Union*, 486 F.2d 907 (1973), enforced the Board's order finding NMU's violation of Section 8(e) of the Act. NMU's argument was not that the transfer of vessels provision was not an agreement whereby Commerce agreed to cease or refrain from doing business with Vantage or any other company which refused to comply with the terms of agreements of the NMU agreement. Rather, NMU argued solely that its clause fell within "work preservation" as defined and enunciated by this Court in *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed. 2d 357 (1967), arguing that the clause intended to benefit all those who were available for employment through the NMU hiring hall, a primary objective.

The Court of Appeals found that this defense was unavailing to NMU, since NMU's motivation was to protect the union's institutional interest rather than the interest of the work unit of Commerce and its members. This was accomplished in order to escape from the Board's rule set forth in *Moore-McCormack Lines, Inc.*, 139 NLRB 796, that upon the sale of a vessel, the purchaser's union mans newly acquired vessels. The NMU clause at issue would require Vantage to assume the NMU contract when under *Moore-McCormack* it was required to man the vessel through the SIU hiring hall. That objective thus was secondary and not protected as primary.

Furthermore, the Court of Appeals found that the NMU's clause was not work-preservative since its practice is to remove all of the seamen from the ship whenever the ship is sold. Finally, the Court refused to accept NMU's argument that the transfer of ship provision is lawful "because prior case law establishes that a contractual provision designed to preserve work for employees in the bargaining unit is valid," stating:

> "While the cases may use the bargaining unit as a yardstick for the permissible scope of a work preservation clause, we are aware of none that do so where, as here, the suggested bargaining unit is many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have had no contact at all with the employer. Moreover, as the Board urges, if the NMU's argument were correct, Congress would have had no reason to enact the proviso to section 8(e) which validates union signatory agreements with respect to job site work in the construction industry,

since the hiring hall, upon which NMU's argument is based, is apparently the central source of employment in the construction industry, Teamsters Local 357 v. NLRB, 365 U.S. 667, 672-673, 81 S. Ct. 835, 6 L.Ed.2d 11 (1961), as it is in the maritime industry." (15a; footnote omitted.)

Argument

The issue in the present case is uniquely narrow, affecting solely the maritime industry and the unique rules and decisions which have been developed for the maritime industry. No amount of strained semantics can convert it into a broadly important question of federal law warranting review by this Court on certiorari. As the Court of Appeals for the Second Circuit aptly quoted, the clause at issue introduced "a new twist to Section 8(e) litigation," *The Developing Labor Law* 107 (1971 Supp.), a project of the Section of Labor Relations Law of the American Bar Association (11a). The "new twist" makes this case unique and its holding narrow. The rivalry between two maritime unions, the NMU and SIU, makes this case unique and its holding narrow. The rules governing the maritime industry and the operation of the NMU's hiring hall makes this case unique and its holding narrow. In brief, none of the circumstances governing review on certiorari as set forth in Rule 19 of the Rules of this Court are present. We respectfully submit that there are no special or important reasons for exercising sound judicial discretion in granting the review on writ of certiorari sought herein.

The Court of Appeals found that the NMU violated Section 8(e) of the Act by maintaining and enforcing Article I, Section 2 of the collective bargaining agreement with Commerce so as to prevent Commerce from selling the *S.S.*

Barbara to Vantage. NMU's contention that the Court of Appeals and the National Labor Relations Board erred in invalidating the contract clause in issue rises and falls upon its assertion that the unit employees for which work preservation is sought are not limited to those individuals permanently employed by the Company but includes "all employees" who are eligible to compete for employment with Commerce or any other employer under contract with the NMU through the NMU hiring hall.

The contention, as thus presented, plainly equates "employee" with "potential employee or applicant for employment," and therein lies its fallacy. By seeking to include in the unit any prospective employee, NMU goes far beyond the scope of the work preservation defense postulated by the Supreme Court in *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967), and urges that the jobs in question not be protected for the employees involved, but preserved for the NMU generally. This is precisely the type of secondary objective condemned in the Court in *National Woodwork*, *supra*.

In *National Woodwork*, this Court set forth the rationale and concepts underlying Section 8(e) and its concomitant Section 8(b)(4)(i)(ii)(B) and the principles or guidelines to be observed in evaluating whether the agreement or conduct challenged is violative of such subsection.

This Court pointedly held that where an agreement is challenged as being violative of the above subsection, the test is:

> "* * * whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the involved employer's] employees, or whether

> the agreement and boycott were tactically calculated to satisfy union objectives elsewhere." 386 U.S. at 644.

and where "elsewhere," the agreement and/or boycott violates such subsections, 386 U.S. at 644-45. In further elucidation of the rationale underlying the aforesaid subsections, the Court continued at page 645:

> "There need not be an actual dispute with the boycotted employer, * * *, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees [footnotes omitted]."

In *National Woodwork*, the Court found the agreement protected because the agreement and conduct was,

> "* * * on the [Employer's] jobsite related *solely* to preservation of the traditional tasks of the jobsite [unit employees] carpenters." (at 646, emphasis supplied)

The Court, by its holding aforesaid, affirmed the decisions and rationale of the Board made prior thereto relative to two fundamental tests, to wit: (1) that the *sole* objective of the agreement and conduct must be to preserve unit work for unit employees and (2) that the agreement and conduct must not be tactically calculated to satisfy union objectives elsewhere.

Where an agreement or conduct is to aid a union's members generally, rather than unit employee members of

the bargaining unit, it is union institutional preservation. Such agreement or conduct in the words of the Supreme Court "is tactically calculated to satisfy objectives other than work preservation for unit employees," and as such, is violative of subsection 8(e) and/or 8(b)(4)(B).

Applying the foregoing principles and authorities to the facts at hand, impels the conclusion that the NMU contracted provision in question, Article 1, Section 2(a) and (b) is in contravention of Section 8(e) of the Act.

First, NMU does not dispute the finding of both the Board (20a) and the Court of Appeals (457 F.2d at pages 1134-1137), that the appropriate unit involving the employees of Commerce is a single employer unit and not a multi-employer or industry-wide unit (NMU's Petition, page 10). But the NMU contends that the unit consists of more than those seamen who are on Commerce's payroll, and that the unit includes all persons entitled to utilize the NMU hiring hall. This argument flies in the face of Article I, Section 1 of the NMU-Commerce collective bargaining agreement, which reads, in part, as follows:

> "**Collective Bargaining Agent.** The Company in entering into this Agreement hereby recognizes the Union as the sole collective bargaining agent for the Unlicensed Personnel employed aboard all vessels of the Company where the Company has recognized the Union as such agent. The Company also recognizes the Union as the sole collective bargaining agent for the Unlicensed Personnel employed by the Company on board all U.S. Flag ocean-going vessels including, but not limited to passenger, freighter, dry-cargo, tanker and bulk carriers, which are owned or operated (both

> at present or at any time during the life of this Agreement) by the Company or any of its subsidiaries or affiliates (whether so at present or at any time during the life of this Agreement), except those Companies and vessels already covered by another AFL-CIO Maritime Union, as an owner, as an agent, as a General Agent of the United States, or under bareboat charter."

Thus, the entire unit consists of those persons who are employed by Commerce—not by all other employers who utilize the NMU hiring hall.

Second, the NMU bargains for other separate and distinct units with different employers based and operating on the Great Lakes and for which there are separate and distinct contracts; not for deep sea or oceangoing vessels. The Great Lakes operations, the terms and conditions of employment in such agreements with the NMU, are substantially different from deep sea agreements. Yet the NMU seamen employed by Great Lakes employers are entitled to utilize the NMU hiring hall, despite the fact that they are already employed in entirely different collective bargaining units.

What the NMU apparently argues for is the novel theory that the approximately 30 jobs aboard the vessel *S.S. Barbara* are preserved for all of the approximate 27,000 persons registered in the NMU hiring hall. Since it is hornbook law that the hiring hall must be open to all, we assume that NMU seeks to "preserve jobs" for any and all future thousands who may secure Coast Guard validation papers hereafter and register, pay the NMU service fee and be available. And of course included therein are

the adventurers for a "trip," those having no nexus with the industry, a summer student and legions yet unborn, a result which would clearly frustrate the intent of Congress in enacting Section 8(e) of the Act. In the posture of the facts present herein, a single employer, 30 permanent jobs for permanent employees as provided by the NMU hiring hall, no multi- or industry-wide unit, such concept is most strange. It is clearly institutional preservation for the NMU, for reasons not "germane to the economic integrity of the principal work unit." *District 9, I.A.M.* v. *N.L.R.B.*, 315 F.2d 33, 36 (C.A.D.C. 1962). "Congress has set its face against such * * * agreement." *Ibid.*

We respectfully submit that the Court of Appeals for the Second Circuit was entirely correct in noting the analogy between the law applicable to the case at bar and the established distinction between "union standards" and "union signatory" subcontracting clauses. "The former, which restrict subcontracting to those who observe certain pay scales and conditions of employment, are valid. [Citations omitted.] The latter, which permit unit work to be transferred to other employers only if they are under contract with the union, are usually held illegal. [Citations omitted.]" (11a). The "union signatory" clause obviously is not germane to the economic integrity of the employees in the primary unit, but serves to enhance the union as an institution, to protect its members no matter by whom and where employed. An agreement containing a "union signatory" clause, or a clause such as present at bar, is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, 386 U.S. at 644-645.

In essence, the NMU seeks to utilize the clause invalidated by the Board to protect its hiring hall, rather than the jobs of the employees of Commerce. No support for this position is found in any of the cases cited by NMU.

Local 872, International Longshoremen's Association, 163 NLRB 586 (1967) and *Local 1351, Steamship Clerks, etc.* v. *N.L.R.B.*, 329 F.2d 259 (D.C. Cir. 1964), cert. denied, 377 U.S. 993 (cited by NMU on p. 14 of its Petition, footnote 6), are inapposite to the proceedings herein. Those cases are concerned solely with the obligation to conduct a hiring hall in a non-discriminatory manner. It simply does not follow from these cases, as urged by NMU, that a collective bargaining agreement which contains a hiring hall provision creates a relationship between the employer and potential employees who might apply for work through the union hiring hall, sufficient to include them in the unit for the purposes of determining whether, under Section 8(e), some other contractual provision has as its purpose valid primary work preservation or a secondary objective tactically calculated to satisfy union objectives elsewhere.

NMU's reliance on *American Federation of Television and Radio Artists, Westinghouse Broadcasting Co., Inc.,* 160 NLRB 241 (1966) (NMU's Petition, p. 15, fn. 6), is totally misplaced and misleading. In that case, the Board simply held that a work standards provision, valid on its face, could not be found invalid under Section 8(e) because it had the effect of protecting the wage standards of other union members not working for the employer party to the collective bargaining agreement.

In the instant case, however, the clause in question is not a work standards clause, but akin to a union signatory

provision plainly intended to aid the NMU in its rivalry with the SIU rather than protect the work of the Commerce employees. Examination of all the surrounding circumstances makes this clear.

It is unquestioned, that commencing in the 1930's up to the present time, there has been continuous, with occasional short intervening periods, intense institutional union rivalry between the SIU affiliated unions and the NMU. Each organization has sought to expand its institutional and membership interests generally, and for at least upwards of the past fifteen years almost exclusively, at the expense of the other organization. This activity has increasingly heightened over the past period, in proportion to the constant decline of American Merchant Marine and it is undisputed, a matter of official notice, that from a level of transporting approximately 25% of our Nation's imports and exports in the late 1940's, the American Merchant Marine presently transports approximately 5% of such cargo. It is further undisputed that for many years, practically all, if not in fact all, American flag vessels have been unionized with the unions herein involved, representing unlicensed seamen aboard the overwhelming majority of the vessels, the extremely small remaining balance, represented by independent unions.

The maritime industry, consistently and to date, has most substantial sales and transfers of vessels among American Flag operators and with the decline of American Flag vessel operators, increasingly more ship sales and transfers to and among the remaining operators. The SIU and its affiliates, and the NMU, mutually and with-

out Board or Court edict, from 1942 to shortly before the Board's decision in 1962 in *Moore-McCormack Lines, Inc.*, 139 NLRB 796 followed a custom and practice, with some exceptions based upon special circumstances, that whenever a company transferred a vessel, the union having a collective bargaining agreement covering the unlicensed seamen of the purchasing company would have its contract apply, as the vessel would then be part of that company's "fleet-wide unit." *Moore-McCormack, supra*, p. 798, fn. 3.

In 1957 there arose a special circumstance as aforesaid, and SIU petitioned the Board for self-determination elections for each Robin Line vessel under collective bargaining agreement with them, which were sold to Moore-McCormack, the latter having collective bargaining agreements with the NMU. Based upon such special circumstances, the Board after such self-determination election, certified each vessel as separate units. *Moore-McCormack, supra*, at 797.

In 1962, NMU apparently unhappy with the Board's 1957 decision aforesaid, again petitioned the Board, resulting in the 1962 *Moore-McCormack* decision, 139 NLRB 796. The Board laid down the flat rule, a rule thereafter consistently understood and followed by the General Counsel and reaffirmed by the Board, that in the maritime shipping industry, because of the long history, practice and custom, elimination of interunion rivalry, to diminish work stoppages, facilitate transfers and personnel, in other words industrial stability consistent with employee rights, as the unions had made clear by their custom and practice, *that a fleetwide unit is appropriate as the general rule overborne only in a particular case by special circumstances which*

indicate the injustice or unsuitability of such general rule (*Moore-McCormack* at 798-9).

The Board's holding in 1969 in *National Maritime Union of America* (*Overseas Carriers Corporation*), 174 NLRB 216, found accretion to fleetwide units as the law, reaffirmed *Moore-McCormack*, and adopted the Trial Examiner's finding that:

> "The events in this proceeding make evident the validity of the Board's observation in the *Moore-McCormack* case, *supra*, that 'elimination of inter-union rivalry with respect to similar employees of the same employer and a consequent diminution of conflicts which may bring on work stoppages' is one of the considerations pointing to the advantage of a fleetwide unit."

Indeed, the rule of a "fleetwide unit" is the rule that both the NMU and the SIU have lived by. The lack of reported cases may be some indication of the lessening of conflict between these ancient rivals. But even when there was conflict in connection with transfers which were the subject of unfair labor practice charges, the record demonstrates uniform application of the *Moore-McCormack* rule, affirmed by *Overseas Carriers*, *supra*, that where vessels are sold or transferred, they accrete to the fleetwide unit of the purchaser or transferee on authority of *Moore-McCormack*. The foregoing demonstrates the consistent record of the application of the principle enunciated in *Moore-McCormack*, that is, accretion to fleetwide units of the purchaser or transferee.

The foregoing history, particularly post *Moore-McCormack*, as enunciated in *Overseas Carriers*, was intended to

and has brought forth the requisite stability to the industry. Both the NMU and SIU, in order to protect the stabilizing effect of the *Moore-McCormack* rule, inserted into their agreements an all-encompassing recognitional clause to insure that after-acquired vessels would be covered by the agreements and would accrete to the fleetwide unit.

But the NMU was not satisfied. In order to protect an institutional object, preservation of jobs for its members generally, without regard to observance of the rule of law set forth in *Moore-McCormack*, the NMU introduced the clause at issue herein, as well as the continuation of its broad recognition clause, in order that not only would all ships purchased by its companies accrete into the NMU fold, but any of its employers' ships which would be subject to transfer would be also kept within the NMU fold.

It must be clear and certainly must be concluded that an object of NMU's restrictive transfer clause is to frustrate the application of the *Moore-McCormack* doctrine of fleetwide units and accretion thereto as the general rule in the maritime industry. By such object, the clause and its implementation has the secondary intendment and result upon others, neutral employers as in the case at bar, Vantage.

Further evidence of the intendment of the NMU restrictive transfer clause, "tactically calculated to satisfy union objects elsewhere," is found in the limited application of the clause and its implementation, to the facts of life in the maritime industry. It is gainsaid that for all practical purposes, the SIU and the NMU represent the unlicensed seamen in the American Merchant Marine fleet. With this

fact in mind, the NMU still insists that its restrictive transfer clause was intended to preserve the unit work for unit employees.

Upon close scrutiny, it is clear that such was not the sole purpose. On the contrary, under the language of such clause, there is no restriction upon transferring or selling any of the vessels to foreign operators not covered by the United States flag. Many NMU contracted vessels were so sold. There is no requirement for the foreign operator to execute an undertaking as to the seller's collective bargaining agreement, a novation. Certainly not even by the wildest stretch of imagination may one say that there is present "work preservation," within the term as phrased by this Court in *National Woodwork*, to wit, conduct or intendment of the union "related solely to preservation of the traditional task [the work] of job site carpenters" [here seamen aboard the vessel].

Such alleged preservation becomes applicable only when the vessel would be transferred to a SIU contracted employer, the secondary employer, the neutral, at bar Vantage. This is clearly the intendment, its activity and object, "tactically calculated to satisfy NMU objectives elsewhere" —prohibited intendment and conduct.

NMU's clause does not protect all unit work, only that which its rival, the SIU, would be entitled to under the *Moore-McCormack* rule. As far as the NMU clause is concerned, there is no restriction, no work preservation even if its members' entire work, all vessels, are sold to foreign operators. To suggest, let alone contend, that under such

a state of facts, the agreement is primary work preservation and not secondary is, we respectfully submit, to demonstrate a total ignorance of the law applicable in 8(e) cases.

The weakness of NMU's argument is manifested by the palpably inappropriate analogy to job protection of men on lay-off who are required to be recalled before an employer may subcontract work (NMU's Petition, p. 16). Employees on lay-off obviously enjoy contractual rights flowing from a prior employment relationship.

The weakness of NMU's argument is further manifested by its attempt to justify the inclusion of the ship transfer clause, to wit, "to bring * * * most important, stability to the NMU Pension Plan which would suffer impairment if employment by the contract employers were to substantially decline" (NMU's Petition, p. 5). The stability of the NMU Pension Plan is a far cry from "work preservation." Indeed, such a "most important" goal fits neatly into what this Court has proscribed—a clause "tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, 386 U.S. at 644-645.

Finally, the NMU places principal reliance upon the Board's *assumption, without deciding*, that the single employer Commerce unit could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce (NMU's Petition, p. 9; 20a). The NMU interprets that assumption as follows: that the unit represented by the NMU could be deemed to include "those employees entitled to seek employment through the NMU hiring hall" (NMU's Petition, p. 9); but that is

not what the Board said. The Board said solely that it could include those who in the future may be referred from the hiring hall to work on a Commerce ship. The physical presence of such employee on the vessel operated by Commerce is necessary before he can become a member of the collective bargaining unit. The strained expansion of what the Board wrote is indicative of the lack of merit of NMU's Petition.

Cutting through the verbal smokescreen thrown up by NMU, it is crystal clear that NMU, through the provision at bar, is seeking to protect itself as a union, and that protection of the jobs of the Commerce employees affected by the proposed sale of the vessel was not intended. Moreover, it is beyond cavil that acceptance of the arguments urged here by NMU will do substantial violence to the unit principles spelled out by the Board in *Moore-McCormack, supra*, and its progeny.

For all of the foregoing reasons, the decision below is clearly correct. There is no conflict of decision among lower courts. There is no important question of federal law present herein. The facts and issues present herein are so narrow and unique as not to require review by this Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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